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No. 193. 193

Brf. of Cheyney & Lewis for Appe

Office Supreme Court U.S.
FILED
MAR 12 1901
JAMES H. MCKENNEY
Clerk.

IN THE

Filed Mar. 12, 1901.

Supreme Court of the United States.

October Term, 1900.

THE INTERNATIONAL NAVIGATION COMPANY,
Petitioner and Appellant (Respondent),

v.

FARR & BAILEY MANUFACTURING CO.,
Appellee (Libellant).

Brief for Appellee.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel for Appellees.

722 Bourse Building,
Philadelphia.

COUNTER STATEMENT.

This action was brought by the Farr & Bailey Manufacturing Company, appellee against the International Navigation Company, appellant, owner of the steamship "Indiana," to recover the sum of $2084.15, for damage to twenty bales of burlaps, which were delivered to the Navigation Company, at Liverpool, England, May 21, 1895, on board its steamship "Indiana," in good order and condition, for carriage to the appellee, at Philadelphia.

Upon the arrival of the steamship at Philadelphia the burlaps were found to have been damaged by sea water.

The answer of the Navigation Company admitted the receipt of the burlaps at Liverpool, in good order and condition, and that some damage was done to them during the voyage, by sea water entering through a port hole, which became opened through some unknown cause or agency. Liability was denied for a number of reasons, which were set forth fully in the answer.

At the trial of the cause, however, the respondent defended solely upon the ground that it was excused from liability, by the provisions of the Act of Congress of February 13, 1893, commonly known as the "Harter Act."

The port through which the water entered was only *two or three feet above the water line* (Record, p. 88.), and a very slight roll of the ship, in a moderate sea, was sufficient to submerge it (Shackford, p. 65).

It was about nine inches in diameter and was fitted with a glass cover, opening *fore and aft*, on a hinge, and over that fitted a hinged iron cover or "dummy," opening *upward*. Both the glass cover and the dummy were provided with nuts and screws for the purpose of fastening them, and when properly fastened were water-tight.

A few days after the departure of the vessel from Liverpool, the soundings showed a leak, and when the hatch of the hold containing this cargo was opened, it was found that both the glass cover and the iron dummy were *wide open* and the water entering through the full bore of the open port.

The carpenter says (Rec. p. 35):

"When we got the cover off the hatch a deck hand who was assisting in doing so said *'I can see daylight down there.'* I said 'throw the hatch off' and I jumped down into the hold and found the after port on the starboard side *wide open* and the sea coming in the *full bore of the opening* and washing clean across the ship when she rolled."

The learned Judge of the District Court found as a fact:

"The port in question was *either not fastened at all, or was insecurely fastened* when the vessel left Liverpool. In either event it follows that the vessel was not seaworthy." (Rec. p. 100.)

He says in his first opinion (Record, p. 95):

"Both covers of the ports were unfastened or open, but there was no sign of injury to either or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel."

The same conclusion of fact was reached by the Court of Appeals. It is said in the opinion, by DALLAS, J.

"The impression made upon us by the evidence is that it was probably closed, but, be this as it may, *certain it is that it was not securely fastened.*"

Considering the fact that the port was found to be wide open by the carpenter, it would seem that the port covers were never closed. The iron dummy was hung vertically, being suspended on a hinge, at the top, and as it would fall down of its own weight, the carpenter's testimony that it was "wide open," admitting daylight, and that the water was "coming in the full bore" is equivalent to a statement that the iron port cover *was fastened up.*

It was argued by the respondent in the courts below, that the port covers were securely fastened at the time the ship sailed from Liverpool, and that they were improperly opened by some one during the voyage. The testimony gives no support to that argument, however, and this argument has now apparently been abandoned, and the correctness of the findings that the port covers were insecurely fastened at the commencement of the voyage, seems to be admitted.

Argument.

If the respondent is free from responsibility for the damage to these burlaps, that result has been brought about by the "Harter Act."

The third section provides:

"That if the owner of any vessel * * * shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner, or owners, agents or charters, shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of said vessel."

The respondent claims the benefit of this provision alleging that the failure to properly secure the port covers, prior to the commencement of the voyage, or subsequently, although supposed to be properly closed, was a fault or error in the "management" of the vessel.

Three questions therefore arise in this case:

1. Was the "Indiana" seaworthy at the time she sailed from Liverpool?

2. If unseaworthy, had the respondent exercised "due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied?

3. Was respondent's failure to properly close and secure the port covers, either before, or during the voyage, an error or fault of "management" within the provisions of Sec. 3?

It will be observed that the third question can only arise in the event of an affirmative answer to the second, as the owner is by the terms of the third section, only relieved from faults or errors in the "management" of the vessel, when there has been the exercise of due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied.

Was the "Indiana" seaworthy at the commencement of the voyage?

Definition.

Mr. Justice GRAY says in delivering the opinion in the *Silvia*, 171 U. S., 462:

"The test of seaworthiness is whether the vessel *is reasonably fit to carry the cargo* which she has undertaken to transport. This is the commonly accepted definition of seaworthiness."

Lord BLACKBURN defined it similarly in the case of *Steel* v. *State Line Steamship Co.*, 3 Appeal Cases, 72.

Seaworthiness means "the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic."

Judged by the above test, there can be no doubt but that the *Indiana* was actually unseaworthy when the voyage began; that is, unfit to carry the appellee's burlaps, in the compartment where they were stowed.

The conclusion of the Judge of the District Court, (in the very opinion in which he yields to what he deemed a binding decision of this court in the *Silvia*, 171 U. S., 462, is unanswerable.

He says in that opinion (Rec., p. 101):

"The result was unseaworthiness *because the vessel set sail with a hole in her side*, that was not only unknown to her officers, but was believed not to exist. *She was therefore not in a condition to afford due protection to the cargo in this particular compartment. If* the hole had been caused by a collision at her berth, and she had been sent upon her voyage without repair, it could not be succesfully asserted that she was seaworthy."

The Silvia Case.

It will be seen by consideration of the two opinions filed by the Judge of the District Court, that he entertained decided views as to the unseaworthiness of the vessel; but he was of the opinion, however, that the decision of this court in the *Silvia*, 171 U. S., 462, constrained him, notwithstanding his own views, to hold that the "Indiana" was seaworthy, when she sailed from Liverpool.

Judge GRAY, in his dissenting opinion in the Circuit Court of Appeals, was also of opinion that the decision in that case was binding in the present one, and it is upon that decision that the appellant's argument as to the seaworthiness of the "Indiana" is based, rather than upon any circumstances showing actual seaworthiness. Seaworthiness is a condition depending upon many circumstances.

Lord BLACKBURN in *Steele* v. *State Line S. S. Co.*, L. R. 3, App. Cases, 72, says:

"It will be a question, taking the whole circumstances together, was this ship reasonably fit to encounter the perils and was the damage that happened as a consequence of her being unfit if she was unfit. That question will have to be determined upon the whole cirumstances and the whole evidence.

It is obvious that this court did *not pronounce any general rule of law as to the seaworthiness of vessels, in the Silvia, but decided the case upon the facts alone.* The decision in that case is applicable to the present one, therefore, only if the facts of the two cases were so identical, as to produce a similar fitness or unfitness for the comtemplated voyages.

What were the facts of the two cases? Were they so identical as to compel the Court below to find that the "Indiana" was seaworthy?

In the case of the *Silvia*, the facts were as follows:

The *Silvia*, with sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks, next the forecastle, had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line, when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five-eights of an inch thick, set in a brass frame, as well as with an inner cover, or "dummy," of iron. When the ship sailed,

the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment, should it become necessary to get anything from it. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken—whether by the force of the seas or by floating timber or wreckage was wholly a matter of conjecture—and the water came in through the port and damaged the sugar.

In the present case the facts are as follows :

The compartment in which the burlaps were carried, on the voyage in question, was used exclusively as a cargo hold and contained the burlaps and some other cargo. The port was eight or nine inches in diameter, furnished with a cover of glass set in a brass frame, as well as an inner cover, or dummy, of iron. The dummy opened upward, while the glass cover opened horizontally,

Both the iron and the glass covers were intended to be closed before the loading of any cargo. The second and third officers, and the carpenter, testified that it was their respective duties, either to close both the glass and iron covers, or to see that the covers were closed, before any cargo was received. (Dixon, p. 86 ; Forbes, p51 ; Miller, 33.) All of these officers were under the impression that both port covers were properly closed at the time the loading of the cargo was completed. *The hatches were battened down, with the officers under that impression, and with no expectation on the part of any one to give any further attention to the port covers, during the voyage.*

The port in question was only two or three feet above the water line (Dixon, p. 88) and a very slight roll of the ship, in a moderate sea, was sufficient to submerge it and to permit the influx of water (Shackford, p. 65). A few days after the commencement of the voyage, and without any unusual weather having been experienced, the soundings indicated a leak, the hatches of this compartment were unbattened, and it was found that the port was wide open, indicat-

ing that the iron dummy must have been fastened up, and that a large amount of water had been admitted to the compartment.

It will be seen by a comparison of the facts in these two cases, that although there are some circumstances similar in each, yet *in the most important particulars, the cases are absolutely different.* Those which are most strikingly different are as follows:

1.—In the "Silvia" case the glass cover was properly and tightly fastened, and the iron dummy only left open. In the present case both covers were open, and there was absolutely nothing to prevent the inflow of water.

These facts are beyond dispute. In the opinion in the *Silvia*, Mr. Justice GRAY says:

"When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the *iron covers were left open to admit light to the compartment should it be necessary to get anything from it.*"

In the present case the Judge of the District Court below finds as follows:

"We therefore find as a fact that the port in question was either not fastened at all, or was insecurely fastened, when the vessel left Liverpool."

And in the Circuit Court of Appeals it is said:

"Certain it is that it was not securely fastened."

As will be shown more fully hereafter, this distinction is most important.

The Circuit Court of Appeals in the *Silvia* case held (68 Fed., 231):

"In the state of weather during the first few hours of the voyage *there was no necessity for closing the ports with the iron covers*" and "*the glass covers * * * were adequate* for fair weather."

That ruling was affirmed by the Supreme Court.

Surely the conclusion that the *Silvia* was seaworthy in fair weather, with the glass cover only closed, is not adequate proof that the "Indiana" was also seaworthy, with a port entirely open, and in such a position that it was bound to be submerged by the first moderate sea.

In the former case there was *some* protection against the influx of sea water, which the court held adequate, while in this case *there was no protection whatever.*

2.—On the "Silvia" it was the practice to close the glass port only and to leave the dummy open for the purpose of admitting light to the compartment, should it be necessary to get any of the stores contained therein; while on the "Indiana" it was the practice to close both the glass port and the iron dummy, and it was the duty of at least three officers to see that both were properly fastened.

In support of this statement, the attention of the court is called to the uncontradicted testimony contained in the Record in the *Silvia* case.

CLARK, the master of the *Silvia*, testified (*Silvia* Record p. 12):

"*Q.* So far as your experience extends, has it been customary to close the shutters or leave the shutters open?

"*A.* When it is in a hold with cargo we usually shut them. If it is not, we don't. We consider the glass quite sufficient to keep out the water."

NICHOLSON, the mate of the *Silvia*, testified (*Silvia* Record, p. 29), that the iron shutters had never been closed while he was on the vessel.

"*Q.* What do you depend on to keep out the sea?

"*A.* The glass.

SHOTTEL, the carpenter of the *Silvia*, testified (*Silvia*, Record, p. 37):

"The shutters, as a rule, are always open."

This court expressly found that the port in the *Silvia* was one which it was customary to close with the glass cover only,

Mr. Justice GRAY says, in delivering the opinion of this court, at page 465:

"The ports were in a place where *these shutters would usually be left open* for the admission of light."

How different is the case of the "Indiana"! There is no question as to the practice upon that vessel.

DIXON, second officer, testified (Record, p. 86), that it was his duty to see that both the glass covers and iron dummies were closed and properly fastened. A similar duty was imposed upon the third officer (Record, p. 51), and it was the carpenter's duty to actually close them (Record, p. 33).

In the *Silvia*, the port was *eight or nine* feet above the water line, far beyond the reach of any ordinary sea, and did not open into a cargo compartment, and when closed with the glass cover alone was absolutely water-tight, while the the port of the "Indiana" opened directly into a cargo compartment, and was only *two or three* feet above the water line, and in a position where it would be submerged by any moderate sea.

3.—In the "Silvia" case, the officers were aware that the iron dummy was not closed, as it was designedly left open for the purpose of admitting light, while in the present case the officers were not aware the covers were open.

Mr. Justice GRAY, in delivering the opinion in the former case, so expressly finds (page 464).

"The glass covers were tightly closed, but *the iron covers were left open in order to light the compartment* should it become necessary to get anything from it."

In the Court of Appeals the ruling was similar. In delivering the opinion of the court, WALLACE, J., says (68 Fed., 230 at 231):

"The officers of the vessel regarded the glass covers as strong

enough to resist ordinary heavy seas, and seem to have left the *iron covers unclosed intentionally* upon the present voyage, in order that the compartment might be light in case it became necessary to visit it."

The master, of the *Silvia* said (*Silvia* Record p. 24):

"*Q.* No particular reason for leaving it (the iron shutter) open, was there?

"*A. Yes; we wanted to go down there at any time for stores, oil, lights and so on.*"

This is one of the most important facts in the *Silvia*. The Court of Appeals held that the vessel, with the glass cover closed, was seaworthy in ordinary weather, and that the failure, during the voyage, to close the iron dummy, *known to be open*, was a mere fault or error in the management of the vessel.

Upon the other hand, this record presents different facts:

LEACH, the stevedore of the *Indiana*, says (Record, p. 40):

"It is a rule of the service that the *deadlights and dummies are closed* by the ship's carpenter before the vessel begins to take cargo in, and after they have been closed they are not opened again under any circumstances."

DICKSON, second officer of the *Indiana*, says (Record p. 30):

"*Q.* What is your duty on shore with reference to the inspection of ports and deadlights?

A. My duty is to see that they are closed and secured before cargo is taken in the ship."

FORBES, the third officer, testifies (Record, p. 51), that it was his duty to survey the holds and examine the ports, and he further testifies (p. 53) that the master "*almost blamed me for having this thing happen.*"

4.—In the case of the "Silvia" the glass port cover was sufficient protection against the influx of water, as the port was made water tight, while in the case of the

"Indiana" with both covers open, there was absolutely nothing to prevent the influx of water under ordinary conditions, the open port being only two or three feet above the water line, and submerged in the first moderate sea.

The Court of Appeals held that the glass covers of the *Silvia* alone were adequate protection against ordinary weather. In delivering the opinion WALLACE, J., says at 231:

"In the state of the weather during the first few hours of the voyage there was no necessity for closing the ports with the iron covers, none even for closing them with the glass covers, and it can hardly be imagined that a storm would be encountered without premonitions affording ample time for access to the compartment and for fastening the iron covers."

This finding of the Court of Appeals was affirmed by this court. In delivering the opinion Mr. Justice GRAY says, at p. 465:

"But the contention that the *Silvia* was unseaworthy when she sailed from Matanzas *is unsupported by the facts.*"

The evidence fully justified that finding, as it was uncontradicted.

CLARK, the master of the *Silvia*, testified:

"*Q.* Are the glasses deemed sufficiently strong to resist the action of the sea?

A. Yes; we have ports in that vessel that have no shutters to them.

Q. Do you ever remember port lights to have broken from the force of the sea?

A. No." (*Silvia* Record, p. 12.)

NICHOLSON, the mate of the *Silvia*, testified as follows:

"*Q.* What has been the practice of the vessels you have been in as to protecting those glass ports by closing shutters inside of them? Has there been any practice of that kind?

A. We don't close the shutters at sea.

Q. What do you depend on to keep the sea out?

A. The glass.

Q. Did you ever know of any port being broken by the sea?

A. No.

Q. Did you ever hear of it?

A. No.

Both of the courts below have found in the case at bar, that the port covers were either insecurely fastened or not fastened at all when the "Indiana" left Liverpool. The port in question was only two or three feet above the water line.

DICKSON, the second officer of the "Indiana," so testifies (p. 88):

"*Q.* About how high above the surface of the water, when smooth, would be the port or dead light of No. 3 lower steerage when loaded?

A. I should judge between two and three feet.

Q. In weather such as you have had, if that port had been open, would the water have come in?

A. Yes, sir; water went three or four feet above it."

FORBES, the third officer of the "Indiana," testifies (p. 55):

"*A.* On this particular voyage I should think that port must have been from 2 to 4 feet above the water.

Q. What would be the effect of the rolling of the ship if that port was open as to water coming in or not?

A. The water would certainly come in if the port was open.

Q. Would it require a very great rolling in rough weather?

A. I should think not."

CAPTAIN SHACKFORD, Marine Superintendent of the International Navigation Company, the owner of the "Indiana," testifies (Record, p. 65) that a "very *moderate roll*," or a "very *moderate sea*," would be sufficient to submerge this port.

5.—In the case of the "Silvia" the compartment was not used for cargo, but contained ship stores, while in the present case the compartment was used as a cargo hold exclusively."

According to the finding of this court in the *Silvia* case, the compartment "contained only spare sails and ropes and a small quantity of stores." The manner in

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which the damage was caused in that case is described in the brief as follows :

"The steamship sailed from Matanzas in the early morning of the 16th. In the afternoon of the same day the engineer reported water coming through into the engine room (p. 9.), and after a search it was found that the water had come through a port hole or side port on the starboard side of the forward, or No. 1 between decks, had run aft through the wooden bulkhead which divides No. 1 from No. 2 between decks (p. 17) and rising above the coamings of the hatch, which are twelve or fifteen inches high (p. 17), had gone into No. 2 hold.

"No. 1 between decks had no cargo ; it contained only a few ropes and stores (p. 211)."

It is not denied in the present case that the port opened directly into the compartment containing the burlaps of the appellee.

It is asserted, however, in appellant's brief (p. 3) that the goods were stowed in "No. 3, lower steerage or between decks," which was "*frequently* used" for conveyance of passengers "when glass covers only would be closed." And on p. 20 of the appellant's brief this point is argued at some length.

The testimony there quoted is that of the marine superintendent of the line, but it is general in character, and must give way to the positive testimony of the third officer of the vessel.

The marine superintendent admits (Record, p. 65) that there are no permanent berths in this compartment, and that there was no method of communication with it except through the hatch, but that it had been sometimes used for steerage passengers, when temporary stairways were put in the hatch.

This testimony is general in its character, but that of Forbes, the third officer, is clear and explicit.

He testifies (page 57):

"*Q.* And is it (the orlop deck) on the "Indiana" used for carrying cargo entirely ?

A. Yes, sir."

In fact, this witness had never even heard this deck called the "lower steerage," the name now applied to it by the appellant. He testifies (p. 56) under examination in chief:

"Do you know whether it is ever called the lower steerage?

"*A. I never heard anyone call it so, because we had no passengers* there, consequently we never had any occasion to call it the lower steerage. *It has always been filled with cargo during the time I have been on the ship.*"

Objection is made to the testimony of this witness on the ground that it did not appear how long he had been upon the "Indiana," but it will be noticed that his testimony was taken in June, 1896, more than a year after the voyage in question. Presumably he was on the steamer for some time before, and his evidence establishes beyond contravention that this compartment was *not* "frequently used" for the carriage of passengers, as alleged in the appellant's brief.

The distinction is clear. In the "Silvia" the testimony shows that the compartment was used as a room for ship's stores.

In the "Indiana" the compartment was used for cargo exclusively, and there was not the slightest necessity or intention to open the hatches until the arrival of the ship at Philadelphia.

Certainly the foregoing differences in the facts of these cases, are too great to permit the decision in one upon *a question of fact*, to be a binding decision in the other.

The question in both cases is the same—was the vessel seaworthy at the beginning of the voyage?

Mr. Justice GRAY says in the *Silvia, supra* at page 403, that

"The test of seaworthiness is whether the vessel is *reasonably fit to carry the cargo* which she has undertaken to transport."

Judged by this standard, there can be no doubt in the present case.

The port through which the water entered the *Silvia* was water-tight until broken by an extraordinary sea. It was properly closed by the glass cover. It was eight or nine feet from the water line—so high that neither the water or floating wreckage could reach it under ordinary conditions. The officers intentionally left the dummy open to admit light. It was customary to leave it open, and there was ample opportunity to close it upon the approach of severe weather.

It was held that under such conditions, the "Silvia" was seaworthy *at the beginning of the voyage*, and that the failure to close the dummy *during* the voyage, upon the approach of a storm, was an error or fault in management, and therefore within the exceptions of the Harter Act.

In this case the port was entirely open at the beginning of the voyage, or came open because defective, and besides was inevitably bound to be submerged by the first heavy sea. It was supposed to be closed. The hatches were battened down with it open, and with no intention upon the part of any of the officers to give it attention during the voyage.

In the *Silvia* case, the testimony showed beyond question that the vessel was seaworthy with the glass port only closed, but where is there the testimony of a single witness that the "Indiana" was in a seaworthy condition, in sailing with an open port only two or three feet from the water line? Certainly, the officers of the vessel did not consider that she was seaworthy in that condition, as three of them testify to the duty imposed upon them to close it, and they also testify that they were under the impression that it was closed when the ship sailed from Liverpool.

This case must stand upon its own facts, and it is most earnestly argued, that the decision as to the seaworthiness of the *Silvia*, a *water-tight* vessel, does not determine this case where the vessel was not water-tight, but had an open port, only two or three feet above the water line, opening directly into a cargo hold.

In the *Manitoba*, 104 Fed. 145, Judge Brown of the

Southern District of New York, held that the ship was unseaworthy, in sailing with an insecurely fastened port, at the distance of 8 or 10 feet above the water line, while in the present case, the port was from 2 to 4 feet only from the the water line.

SECOND POINT.

The respondent did not "exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied."

The appellant argues (1) that the owner "exercises due diligence" by providing a vessel properly constructed and equipped; and (2) that while he is responsible for the misuse or non use of the structure or equipment by a "shore" agent, he exercises "due diligence" by the *selection of competent "sea" agents*, and that he is not responsible for *misuse or non use of the structure*, by the latter, even though it may produce *unseaworthiness* before the commencement of the voyage.

Judge GRAY in his dissenting opinion in the Circuit Court of Appeals, takes an amazingly advanced ground as to the degree of diligence required of the owner. He says:

"If the ship when she left port was not defective *in structure or equipment*, she was, within every reasonable definition of the term, seaworthy."

In other words, that if the owner provides a vessel properly constructed and equipped, he is absolved from all responsibility, no matter how unseaworthy the vessel *may actually be* at the commencement of the voyage, through the misuse of the equipment by the owner's servants. Even the appellant hesitates about going that far. It is admitted by the appellant (Brief p. 28) that there is a "warranty of faultlessness" as to the shore agents, in construction, equipment and stowage, but it is asserted that the only diligence required as to "sea" agents, is in selection, and that every act of a "sea" agent, relieves the owner, even if committed before the commencement of the voyage and though that it may produce actual initial unseaworthiness.

The ship owner does not "exercise due diligence" within the meaning of the Harter Act, by merely furnishing proper structure and equipment. The law requires "due diligence" to make the vessel seaworthy also on the part of all of his servants, in the use of the equipment, before sailing.

Reference to the Harter Act, shows clearly that the view of Judge GRAY is erroneous. The obligation there imposed, is not to furnish a vessel properly constructed and equipped alone. The owner's duty is to exercise due diligence to "properly (1) equip, (2) man, (3) provision and (4) outfit said vessel and (5) *to make said vessel seaworthy* (*i. e. fit*), *and* (6) *capable of performing her intended voyage.*"

As before stated, the appellant while taking the view of Judge GRAY in the court below, has *now* abandoned it, and attempts to make a distinction between the misuse of equipment by socalled "shore" agents and "sea" agents.

II.

Even if the reason for such a distinction were clear, the facts in this case do not support it. If the appellant's witnesses are to be credited, the misuse of the equipment was not by a "sea" agent but by a "shore" agent.

The second and third officers, and carpenter (so-called "sea" agents) testify that it was their duty to close the ports and that they performed this duty before any cargo was put into the compartment.

Leach—the foreman stevedore—(a "shore" agent) says that it was the duty of the carpenter to close the covers before any cargo was taken in, but that it was also his own duty to see that they were properly closed. (Rec., p. 40.)

According to the appellant's testimony, therefore, this duty was cast upon both "sea" and "shore" agents, and there is no definite evidence how the port covers became or were opened. The law recognises no such distinction between the agents, as the appellant now attempts to make.

It does not regard the *servant* employed by the owner "to make said vessel seaworthy and capable of perform-

ing her intended voyage." It is concerned only with the *character of the work done by the servant.*

Not only is there nothing in the Harter Act to support this refined distinction, made by appellant, between the responsibility for acts of "sea" and "shore" agents, but the facts of this case completely refute it.

It is said in appellant's brief (p. 28): "To these sea agents is confided the management of the ship's appliances, its pipes, valves, *ports*," etc.

Now, it is true that the officers of the vessel say that it was their duty to see that the ports were closed, before the reception of any cargo, but Leach, the appellant's foreman stevedore (a "shore" agent), says that it was his duty also to see that the ports were properly closed.

DONBAVAND testifies similarly, and that if the ports are found to require attention, it is the foreman's duty to notify the ship's officers (p. 45).

It is obvious that if any distinction can be made between these various acts, that the making of the ship seaworthy to receive cargo, no matter what use of appliances may be necessary, is essentially a "shore" act, and we therefore have, as the appellant's real argument, that there is no liability, although the ship was unseaworthy, because that unseaworthiness was the result of the negligence of a "sea" agent in performing a "shore" act.

III.

It may be fairly said that the law is now well settled that the ship owner does not use "due diligence" to make the vessel seaworthy within the meaning of the Harter Act, by merely furnishing proper equipment. It requires "due diligence" also on the part of his servants, in the use of the equipment *before the commencement of the voyage, and until it is actually commenced.*

The question came before the Court of Appeals, in England, in *Dobell* v. *Steamship Rossmore Co.*, L. R. (1895) 2 Q. B., 408.

The "Rossmore" left Baltimore with a port improperly caulked, through the negligence of the ship's carpenter (a sea agent). Sea water entered into this port and damaged the cargo. She was admitted to be unseaworthy by reason of the condition of the port.

The Harter Act was included in the bill of lading, and the question arose whether the owners had exercised "due dillgence," required by the Act, in personally furnishing a proper covering for the port and in employing competent servants. It was held that they had not, *as the Act required, "due diligence" on the part of the servants and agents of the owner, as well as on his part personally.*

The only decision suggesting a different view is that of Judge BROWN, of the Southern District of New York, in the *Silvia*, 64 Fed., 608.

Since that decision, Judge BROWN has, however, himself changed his views, and has repeatedly held that the Act requires due diligence on the part of the agents of the owner, as well as the owner himself. In other words, that it requires *due diligence in the work itself.*

The Mary L. Peters, 68 Fed., 919;
The Flamborough, 69 Fed., 470;
The Alvena, 74 Fed., 252;
The Colina, 82 Fed., 665;
The Manitoba, 104 Fed.

THIRD POINT.

The failure to close the port covers was not an error in "navigation, or in the management of the vessel."

1.

The appellant contends that everything done by the "sea" agent is "management" and within the terms of the Harter Act, even if that thing is done before the vessel sails and renders it actually unseaworthy.

If the word "management" stood alone, there might be some force in that argument, but it must be remembered that the Act relieves the owner from liability for "faults or errors in management," only when he has exercised "due

diligence" to make the said vessel (1) *in all respects seaworthy*, and (2) properly manned, (3) equipped, and (4) supplied.

This section does not make any refined distinction between unseaworthiness produced by the negligence of a "sea" agent through the misuse of equipment, and that of the shore agent. It provides, in unmistakable language, that due diligence must be used to make her seaworthy in *all respects*, in addition to the equipment.

From the plain language of the statute, it is manifest that the owner, in order to relieve himself of liability on account of error or fault in "management," must show a condition precedent; that is, either seaworthiness or the exercise of due diligence to make the ship seaworthy, and the burden is upon the owner to show the exercise of due diligence.

The Friesland, 104 Fed. 99.
The Manitoba, 104 Fed. 145.

Is is equally clear that as seaworthiness at the commencement of the voyage, is a condition precedent to the defence of a fault in management, the latter defence can have no application save where the fault complained of, follows the time fixed for seaworthiness, that is, the commencement of the voyage. In other words, is is only errors or faults of management *during the voyage* which excuse the owner.

That is clearly stated in the opinion of this court in the "Silvia," 107 U. S., 462. It is there said:

"The case does not require a comprehensive definition of the word 'navigation' and 'management' of a vessel, * * * but they do include at least the control *during the voyage* of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the sea."

This point seems well settled.

Dobell v. *S. S. Rossmore*, L. R. 1895, 2 Q. B. 408.
The Mexican Prince, 82 Fed. 484.

Judge BROWN, in his opinion, in the latter case, says:

"In other words, the fault arose wholly in the 'management of the ship' at a port of call and subsequent thereto; *it arose during the*

voyage, and not from anything the owners did or omitted to do, or any lack of diligence by them, to make the ship seaworthy, *at the commencement of the voyage*."

This point seems to be considered so well settled, by the profession, that in the *Manitoba*, 104 Fed. 145, a case almost identical with the present one, there is not the slightest reference to it in the elaborate opinion of Judge BROWN. It does not seem to have been raised at all.

2.

Furthermore, the argument that the Harter Act exempts the owners from liability for faults in "management," both *before* sailing and *during* the voyage, is but the restatement, in a new form, of the preceding proposition, which the courts have repudiated, *i. e.*, that the owner uses "due diligence" by properly manning and equipping the ship, and is not responsible for the lack of "due diligence" on the part of servants he employs to make it seaworthy.

The appellant contends that the failure of the officers and crew to properly use the equipment, both *before* sailing and *during the voyage*, is an error in "management" alone. It will be noticed that this is the *whole time during which there is occasion to make use of the equipment.* It is equivalent to saying that *every* act of neglect to properly use the equipment is an error in "management." Such an argument leaves no room whatever for the application of the preceding principle, that the Act requires "due diligence" on the part of the servants of the owner to so use the appliances, which the owner has supplied, as to make the vessel actually seaworthy, as well as on the part of the owner personally to furnish the proper equipment.

The argument that "management" includes faults in the use of equipment both *before sailing* and *during the voyage*, is in effect an argument that the Act exempts the ship owner from *every act of negligence* of the officers or crew, either in the use of the vessel as a whole, or of its equipment.

Whether any act of negligence is an error in "management" depends entirely upon the result produced.

Seaworthiness is a condition only, and initial unseaworthiness is *almost invariably the result of negligence*. The only exception is that of latent defect—in a shaft, for instance. If the negligence of the crew makes the vessel unfit to start on the voyage, such negligence is not an error in "management," but the vessel is unseaworthy, and the Harter Act has no application.

3.

It having been shown that the failure to use proper equipment *during* the voyage is an error in "management" only, the sole question remaining is the effect of negligence in the use of equipment *before* sailing.

It has been shown already that it *may* create unseaworthiness, but it is frankly admitted by appellee, that every failure to properly use the equipment, before the ship breaks ground, does not create initial unseaworthiness. This is evident from the meaning of seaworthiness — fitness for the voyage. Obviously not every failure to use the proper appliances renders the vessel unfitted.

Every vessel has some ports which in ordinary practice are left open, and although the failure to close them upon the approach of a storm, during the voyage, may be negligence, it certainly is not sufficient to make the vessel unseaworthy in reality. If such a rule were applied every vessel sailing the ocean would be unseaworthy.

The illustrations given in the dissenting opinion of Judge GRAY fall within this class. But there is a clear distinction between them, and an insecurely fastened or open port hole, within a few feet of the water line. In the latter case the ship is at once made unseaworthy, while in the cases cited by Judge GRAY, only unusual conditions could render the ship unseaworthy. The distinction is pointed out by Lord HERSCHEL, in the case of *Hedley* v. *Pinkney & Sons S. S. Co.*, *supra*. He follows *Steel* v. *S. S. Co.*, *supra*, saying that "the failure

properly to secure many ports of the ship *which are in ordinary practice open, from time to time,*" does not create unseaworthiness.

The same ruling was followed in the *Silvia, supra.* In delivering the opinion Mr. Justice GRAY says:

"As the ports were in a place where the shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing."

In the present case not only were the covers not ordinarily left open, but also the duty to close them was imposed upon four different persons, all of whom thought the covers were actually closed and properly fastened.

The appellant refers to a number of authorities in support of the argument, that the "faults of management" are not only those committed *during* the voyage, but prior thereto.

The only American case referred to is the *Mexican Prince*, 82 Fed. 484.

Why this case should be cited in support of that argument is beyond comprehension, as Judge BROWN'S decision is directly contrary to it.

In that case, the damage was caused by the neglect to test a certain valve, before attempting to remove the water ballast *during the voyage.*

Judge BROWN, in his opinion expressly says:

"In other words, the fault arose wholly in the 'management of the ship' at a port of call and subsequent thereto; *it arose during the the voyage,* and not from anything the owners did or omitted to do, or any lack of diligence by them, *to make the ship seaworthy at the commencement of the voyage.*

The other authorities cited are English decisions as follows:

Carmichael v. *Liverpool Assn.* 19 Q. B., 242;
Good v. *London Assn.*, L. R., 6 Q. B., 563;
Canada v. *British Assn.*, 23 Q. B., 342;
The Glenochil, (1896) Prob. 10.

In the *Manitoba, supra,* Judge BROWN says in referring to these cases, that they give a construction to the phrase "improper navigation," which seems "*too broad in construction to fit the phrases of the Harter Act*" (p. 155.)

The cases of *Good v. London Steamship Owners' Association,* supra, *Canada Shipping Company* v. *Protective Association* and *Carmichael v. Liverpool Sailing Ship Owners' Mutual Indemnity Association,* are quite similar, and the latter case may be used as an illustration.

It was a suit by the owners of the Ship *Argo* against an association of ship owners which had agreed to indemnify each other against loss or damage to goods or merchandise "caused by improper navigation of the ship carrying the goods or merchandise." From its very nature, the "navigation" contemplated, implied *continuous use* by the officers and crew.

It was held that the damage caused by water coming through an insufficiently secured port, was "improper navigation," against which the ship owner was indemnified by the articles of association.

Attention is particularly directed to the language of the judges who delivered the opinions.

SMITH says:

"The cases cited as the meaning of the word navigation in bills of lading are of no authority, and do not assist us at all in determining in what way we ought to construe the word 'navigation' in in this case."

WILLS said:

"In this case there is, I think, singularly little to be gathered by way of illustration from the cases. With regard to cases dealing with *bills of lading, the words which we have to construe are, in the generality of cases, found in connection with a number of other words which have such a large effect in limiting or extending their meaning that we can gather but little from them as to the construction of the words, when standing, as they do here, by themselves.*"

It will be observed that in those cases the decisions were

limited to the words "improper navigation" when standing *alone*.

There is a clear distinction between them and the present case.

The Harter Act does not, in every case, relieve the ship owner from liability for faults of navigation or management. It frees him only where the ship is seaworthy; or where there has been the exercise of due diligence to make it so. Under the articles of association in the above cases, the owner was indemnified against every act of improper navigation, whether before the voyage, and causing initial unseaworthiness, or during the voyage. Under the Harter Act, relief is given only where the mismanagement does not create initial unseaworthiness.

The *Glenochil, supra*, throws no light on this case. There the ship was *admittedly seaworthy when she sailed* from New Orleans, but there was improper management at the port of discharge, after a considerable portion of the cargo had been unloaded. This was held to be a fault in management under the Harter Act, which was included in the bill of lading. Whether the decision would be followed here is not material for consideration. It is sufficient for the purpose of this argument to show that the owner is not in a position to claim exemption, because his ship was actually unseaworthy at the beginning of the voyage.

The appellant's servants did not exercise due diligence to make the Indiana seaworthy.

The appellant's witnesses show that no attention was given to the ports by any one, at any time after the loading of cargo commenced.

MILLER, the carpenter, testifies (Record, p. 34) that, in company with the marine superintendent of the line at Liverpool, he examined all the ports *on the afternoon of the day before the vessel sailed*, and *before any cargo had been placed in the compartment*, and that they were then all right. His testimony does not show that he made any later examination.

FORBES' (the third officer) testimony is inconsistent with that of the carpenter. He says that the vessel sailed at about 5 o'clock in the morning, and, that *he and the carpenter*, in the early part of the same day made an examination of the ports, and that they were then all right. (Record, p. 52.) If he made an examination at all with the carpenter, he is manifestly in error as to the time.

DICKSON, the second officer, has still another story. He says that it was his duty to see that the ports were properly closed (Record, p. 86) and that *thirty hours before the departure of the vessel*, "I saw they were all secure and all bolted and everything, that is with the carpenter."

Two witnesses testified upon this point.

LEECH, foreman stevedore, says (Record, p. 40), *that he noticed the ports on the day before the vessel sailed* and that they were then closed and the dummies fastened and screwed down tight.

He says that he left the hold about 11 P. M. of the day before the ship sailed. (Rec. 39).

DONBAVAND, another stevedore, testifies that he observed the dead lights in No. 3 lower steerage, and that they were all closed and screwed up, with the dummy covers down and screwed tight, (Record p. 44.) He says that he left the hold about 1.45 A. M. on May 22. As Leech, the foreman stevedore, left at 11 P. M., Donbavand must have left at the same time.

No further attention appears to have been given to them at all, (Rec. 39.)

KELLY, a "shore" carpenter, says that he went on board at 6 A. M. on May 22nd, and went to batten down the hatches of No. 3 hold, and that before battening them down he lifted them and looked down to see if there was any vacant space for baggage. He says positively that he was not in the hold and did not observe the deadlights (p. 48.) He *assumes* that the port was closed, because he saw no light, but the port in question was next the wharf (Record, p. 85), and no light could get in anyhow.

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In the *Manitoba*, 104 Fed. 145, Judge BROWN argues with much force, that such conduct by the crew or stevedores, was not only a failure to exercise due diligence, but that it was a "failure in the proper care and stowage," within the first section of the Harter Act.

FOURTH POINT.

The mental state of master and crew as a factor of seaworthiness.

This appears to be one of the main points in the appellant's brief, and it is argued at some length that the facts that the iron dummy on the *Silvia* was known to be open, but that the officers of the "Indiana" did not know both her port covers were open, but supposed them shut, make no difference.

This point is fully considered in the second opinion of Judge MCPHERSON in the District Court, and in the opinion of Judge DALLAS in the Circuit Court of Appeals. It is likewise fully considered by Judge BROWN, in the *Manitoba*. 104 Fed. 145.

Little can be added to what they have said.

The appellant's argument is erroneous, because based upon misconception of what has been decided in the courts below.

It has not been held that unseaworthiness is converted into seaworthiness by a knowledge of that unseaworthiness on the part of the officer of the vessel, or as the appellant states it: unseaworthiness plus knowledge, does not make seaworthiness, nor has it been so contended or decided.

Seaworthiness is a condition, produced by many circumstances.

There can be no single test for it, but the question always is, whether the ship is in fit condition to encounter the ordinary perils of the voyage.

The appellant argued in the court below that, accessibility of the port was the sole test, and even here it is intimated that it is the principal test. This argument is based upon a misunderstanding of the decision of Lord BLACKBURN, in *Steele* v. *State Line S. S. Co.*, 3 App. Cases, 72.

But Lord BLACKBURN did not lay down such a rule. He did say that if the cargo should be so loaded as to render the port inacessible, that the ship would be unseaworthy, but because *inaccessibility* creates *unseaworthiness*, it does not follow that the converse is true, and that *accessibility* produces *seaworthiness*.

As Lord BLACKBURN says in *Steel* v. *State Line S. S. Co.*, 3 App. Cases, 72:

"It will be a question, *taking the whole circumstances together*, was this ship reasonably fit to encounter the perils and was the damage that happened a consequence of her being unfit, if she was unfit. That question will have to be determined upon *the whole circumstances and the whole evidence*."

While knowledge *may be an important factor* in some cases, we do not consider that under the circumstances of this case, the appellant's liability depends alone upon lack of knowledge that the port covers were open or were insecurely fastened.

The exposed port was only two or three feet above the water line, and in a position where it would be submerged on a moderate roll of the ship. With her hatches battened down there would be no opportunity to close the port in time to prevent the inflow of some water under ordinary conditions. We therefore submit that the "Indiana" would have been unseaworthy, even though the officers were aware of the open port, and the failure to close it would not have been a "fault or error in the management."

The appellant's error is due to the failure to note the true distinction between those ports of the vessel which are *ordinarily* left open, and which, when so open, do not expose the ship to any danger, save under most extraordinary conditions, and between ports of a cargo hold, which *are never left open*, to which no attention is given during the voyage, and which, if open, expose the cargo to danger, under purely ordinary conditions.

In *Steele* v. *State Line S. S.*, *supra*, LORD BLACKBURN says:

"If this port had been, as a port in a cabin or some other place

would be, open, and when they were sailing under the lee of the shore remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on, capable of being closed with a deadlight—in such a case as that, no one could, with any prospect of success, ask any reasonable people, whether they were jury or judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right. If they did not put it right after such warning, that would be negligence on the part of the crew, and not unseaworthiness of the ship."

Of what value would be warning of a storm's approach, *in the absence of the knowledge that the port was open or insecurely fastened?* How would mere accessibility be effective, if there was no intention on the part of the officers to avail themselves of it?

The foregoing case and the following ones have held an intention to close the port to be material. This intention is based *upon* the practice to leave it open.

LORD HERSCHEL, in the case of *Hedley* v. *Pinkney & Sons S. S. Co.*, *supra*, follows *Steel* v. *S. S. Co.*, *supra*, saying that the "failure properly to secure many ports of the ship *which are in ordinary practice open, from time to time*," does not create unseaworthiness.

The same ruling was followed in the *Silvia*, *supra*. In delivering the opinion, Mr. Justice GRAY says:

> *"The ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require.*

In such cases, where the ports are ordinarily left open, initial unseaworthiness does not ensue, and there is only a duty to close them as circumstances may require. The failure to close them during the voyage is negligence on the part of the officers or crew of the vessel and an error or fault in management.

But as Judge DALLAS well says in his opinion in the

Circuit Court of Appeals:

"But in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. *They would not 'usually be left open for the admission of light,' or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary, and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived.* If, as in the 'Silvia' case, the compartment in question had contained only tackle and stores, and if, as in that case, the glass cover had been closed but the iron cover left open to admit light, it would unquestionably have been the duty of the master, upon encountering rough weather, to have had the iron cover closed; *but he cannot be justly said to have committed either a fault or an error in omitting to remedy a defect of which he had no knowledge, and for the existence of which he was in no way responsible*"

These Propositions Seem Indisputable.

1. A glass covered port with an iron dummy back, both properly screwed down, cannot come open, unless defective (Record p. 25,) or knocked open by an extraordinary peril.

2. There is no evidence of any such peril.

3. Respondent claims that the covers were properly screwed down.

4. The covers were subsequently discovered to be open.

5. Therefore they were defective, or were opened intentionally.

6. But there is no evidence that any person opened them, but upon the contrary that the hatches were battened down by carpenters, and no other access possible.

7. Therefore the covers were defective.

If they had never been closed, manifestly the ship was unseaworthy.

If they were opened intentionally, it must have been before the ship sailed, because there is no evidence that the battened down hatches were ever taken off, until the water was discovered.

Respondent has not proved how they were opened, nor, if intentionally, by any one *connected* with the ship's navigation or management.

It is therefore submitted that the decree of the Circuit Court of Appeals for the Third Circuit, (reversing the decree of the District Court dismissing the libel), should be affirmed.

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